(2)

Office-Supreme Court, U.S.
FILED
JAN 3 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-637

In the Supreme Court of the United States

OCTOBER TERM, 1984

CATHERINE PETERSON, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

1

TABLE OF AUTHORITIES

Page

Cases:

Goodrich v. *Department of the Navy*, 733 F.2d 1578, petition for cert. pending, No. 84-577 4

National Treasury Employees Union v. *Department of the Treasury*, 656 F.2d 848 3

O'Donnell v. *Department of the Interior*, 2 M.S.P.B. 604 2

Powell v. *Department of the Treasury*, 8 M.S.P.B. 21 2

Wells v. *Schweiker*, 12 M.S.P.B. 329 3

Statutes:

Privacy Act of 1974, 5 U.S.C. 552a 3

5 U.S.C. 7701(g)(1) 1, 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-637

CATHERINE PETERSON, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a federal employee, seeks review of a decision of the United States Court of Appeals for the Federal Circuit affirming a decision of the Merit Systems Protection Board (MSPB) that awarded her attorney fees pursuant to 5 U.S.C. 7701(g)(1) based upon the expenses incurred by the union whose staff attorney provided her with legal representation before the MSPB.

1. Petitioner was removed from her position with the Department of Energy. She appealed her removal to the MSPB, and the MSPB reversed in a decision dated June 15, 1981 (Pet. App. 18a-19a). On June 24, 1981, petitioner filed an application for attorney fees in the amount of $7,300.00. The fees requested were calculated at the rate of $50.00 per hour for the 146 hours of work her union-employed attorney devoted to the appeal.

An MSPB presiding official determined (Pet. App. 19a-20a) that petitioner was a "prevailing party," that she had "incurred" attorney fees,[1] and that an award of attorney fees in some amount was "warranted in the interest of justice" under 5 U.S.C.7701(g)(1). However, the presiding official declined to award fees to petitioner's union-employed attorney at the requested "market rate" of $50.00 per hour. Rather, relying upon the MSPB's decision in *O'Donnell* v. *Department of the Interior*, 2 M.S.P.B. 604 (1980), and *Powell* v. *Department of the Treasury*, 8 M.S.P.B. 21 (1981), the presiding official held that the fee should be calculated on the basis of the union attorney's salary, plus an equal amount to cover overhead expenses (Pet. App. 21a-23a). Accordingly, after finding that the 146 hours claimed by petitioner's counsel were reasonably devoted to preparing her appeal, the presiding official awarded attorney fees and costs in the total amount of $3,526.68 (*id.* at 23a-24a).

The presiding official determined that the fee award should be made to the attorney who represented petitioner (and who was employed by petitioner's union) from the beginning of the appeal until two days after the attorney fees motion was filed, when she left her position with the union. This determination was based upon the MSPB's holding in *O'Donnell* v. *Department of the Interior, supra*, that attorney fees must be awarded to individual attorneys and not directly to organizations that employ the attorneys (Pet. App. 25a). Petitioner's former attorney agreed to endorse the check she received for fees and costs over to the union (*id.* at 24a).

---

[1]The MSPB has held that attorney fees are "incurred by an employee" if they are incurred on the employee's behalf, even if the employee is not required to pay for them. *O'Donnell* v. *Department of the Interior*, 2 M.S.P.B. 604, 608-610 (1980).

2. Petitioner sought review of the attorney fees award by the full MSPB. She argued that the presiding official erred in computing the fee award on the basis of a cost-plus methodology rather than awarding market rate fees, and she also argued that the fees should have been awarded directly to the union's separate litigation fund rather than to her former attorney (Pet. App. 10a-12a). The MSPB denied the petition for review. It held that the awarding of fees to petitioner's former attorney, rather than to the union's litigation fund, was proper because such awards "avoid[ed] ethical concerns as to whether the organizations, by receiving fee awards, are engaged in the unauthorized practice of law" (Pet. App. 11a). The MSPB further held, based on its decision in *Wells* v. *Schweiker*, 12 M.S.P.B. 329 (1982), that the cost-plus formula utilized by the presiding official was proper. It noted that in *Wells*, it had "declined to treat a union legal services program in the same manner as legal services firms and charitable public-interest organizations for the purpose of awarding market-value attorney fees" (Pet. App. 11a). The Board also found that the reasoning in *National Treasury Employees Union* v. *Department of the Treasury*, 656 F.2d 848, 852 (D.C. Cir. 1981), regarding the ethical problems arising in the award of attorney fees to union-employed counsel, was persuasive "even where the union has established a legal services program" (Pet. App. 12a).[2]

---

[2]In *National Treasury Employees Union*, the union sought market rate attorney fees in a case it successfully prosecuted under the Privacy Act of 1974, 5 U.S.C. 552a. It was uncontested that the union compensated the lawyers who represented it at a rate well below the market rate for their services. The court recognized that the union would profit from the legal activities of its lawyers if they were paid the market value of their services (656 F.2d at 852), and it concluded that this result would be inconsistent with ethical rules barring a lawyer from splitting fees with a lay organization or enabling such an organization to engage in the unauthorized practice of law (*id.* at 851-852).

3. Petitioner then sought review of the MSPB's decision in the United States Court of Appeals for the Federal Circuit. In a brief order (Pet. App. 2a), the court of appeals summarily affirmed the decision of the MSPB, relying upon its earlier decision in *Goodrich* v. *Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), petition for cert. pending, No. 84-577. In *Goodrich*, the court below held that the MSPB did not commit legal error or abuse its discretion in basing the award of attorney fees under 5 U.S.C. 7701(g)(1) on the expenses the union incurred in furnishing the services.

4. The court of appeals in this case affirmed the decision of the MSPB on the basis of its prior decision in *Goodrich* v. *Department of the Navy, supra*, and the question presented in the certiorari petition in this case is identical to that presented in *Goodrich*, petition for cert. pending, No. 84-577. For the reasons stated in our brief in opposition in *Goodrich*,[3] the court of appeals correctly determined that the MSPB did not commit legal error or abuse its discretion in basing the award of attorney fees on the expenses actually incurred by the union in furnishing the legal services. That question affects the award of attorney fees only under the special statutory provision, 5 U.S.C. 7701(g)(1), that is applicable to administrative proceedings in adverse action and other routine personnel cases before the MSPB. That narrow issue does not warrant review by this Court.

---

[3]We are furnishing counsel for petitioner with a copy of our brief in opposition in *Goodrich*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1985

DOJ-1985-01